Government of the District of Columbia

Office of the Attorney General

Testimony of

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PUBLIC ROUNDTABLE ON
POLICE CONDUCT IN THE ENFORCEMENT OF THE DRUNK DRIVING LAWS IN THE DISTRICT OF COLUMBIA

Committee on the Judiciary
Phil Mendelson, Chair
Council of the District of Columbia

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Room 123
John A. Wilson Building
1350 Pennsylvania Avenue, NW
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2:30 P.M.

Good afternoon Councilmember Mendelson, other members of the Council present today, and guests. I am Robert J. Spagnoletti, Attorney General for the District of Columbia. I am pleased to appear before this Committee to engage in – what I sincerely hope will be – a thoughtful discussion regarding the District's drunken driving laws. As you know, my Office is responsible for prosecuting those individuals charged with driving while under the influence and operating a vehicle while impaired. We see nearly two thousand such cases each year and we have particular insight into the operation of current District law. I would also like to briefly comment on Bill 16-463, the "Anti-Drunk Driving Clarification Amendment Act of 2005", which is pending before the Committee on Public Works.

During the past several weeks, there have been a number of newspaper articles discussing the issue of drunk driving or driving while impaired. Many of these articles and the subsequent discussions have been based on a fundamental misunderstanding of District law. I know that this Committee, the Council of the District of Columbia, and the Mayor are all committed to ensuring that our laws are grounded in good public policy, reliable data, and thoughtful debate, particularly in an area such as this where the very safety of our citizens hangs in the balance. No one wants to see more impaired drivers on the road, and great deliberation should go into any changes to our laws relating to drinking and driving. I am hopeful that I can help further the discussion during my testimony today and correct some of the misimpressions that continue to linger about the District's approach to drunken driving.

I would like to do three things during my testimony today:

1. First, I would like to review current District law as it relates to drink driving and the police power to arrest those persons suspected of driving under the influence or while impaired.
2. Second, I would like to briefly review some of the available data on who is being arrested and prosecuted in the District for driving under the influence.
3. Third, I will comment on the legislation that is pending before the Committee on Public Works and offer some additional thoughts on how the District's drunken driving laws can be brought into line with other forward-thinking states.

<u>Current District Law</u>

First, I would like to use a brief PowerPoint presentation to outline the District's laws as they relate to driving while under the influence or while impaired.

PowerPoint presentation [see accompanying presentation]

I. Laws relating to driving after consuming alcohol or drugs
   a. Prohibition on driving with a BAC of .08 or above.
   b. Prohibition on someone under 21 driving with any measurable BAC.
   c. Driving Under the Influence (DUI)
   d. Operating a vehicle While Impaired (OWI)

II. Laws relating to police power to arrest for DUI and OWI

a. Offenses committed in police presence
b. Certain offenses where arrest necessary to preserve evidence or safety of persons or property

III. Laws relating to in-court proof of being under the influence
a. Current law
b. Emergency Act and proposed permanent legislation

As you can see, then, it is not true that the police have unfettered discretion to arrest someone simply because he or she had one drink. Indeed, the question is not whether the driver had a drink, but whether the driver is under the influence or is impaired. Blood alcohol content is but one factor in that analysis. Under the current law, a person who has a Blood Alcohol Content of .08 or above may not operate a vehicle and should be arrested for Driving While Intoxicated. This is in keeping with national standards. Those standards are based on the available scientific evidence, which establishes that .08 is the level at which every person's ability to drive safely is impaired.

Moreover, in the past few years a debate has ensued as to whether this *per se* impairment actually begins below .08. The American Medical Association has recommended that the general limit be lowered to .05, in recognition that impairment often begins at those levels. As a result, some states have already begun to modify their laws to reflect this thinking.

If everyone is impaired at the .08 level, logic suggests that some people must be impaired at lower levels. Thus, in addition to the .08 *per se* rule, every state in the country, including the District, also prohibits the operation of a motor vehicle while impaired, regardless of a person's Blood Alcohol Content. Under these laws, an individual can be arrested and prosecuted based simply on his or her impairment, regardless of their Blood Alcohol Content. Again, every state has such laws. In the District, that charge is called Driving Under the Influence (DUI). DUI may be charged when an individual has a Blood Alcohol Content below .08, but is nonetheless impaired; when an individual refuses to submit to a chemical test, but is nonetheless impaired; and when an individual has no Blood Alcohol Content, but is nonetheless impaired by drugs. Additionally, the combination of drugs and alcohol may create greater impairment at lower Blood Alcohol Content levels.

For all of these individuals, officers and prosecutors have to rely on other standard signs of impairment to determine whether it would be safe to allow the person to continue on the road. Again, this is true not just of the District and the surrounding jurisdictions, but of every jurisdiction in the country. These other signs of impairment are generally standard across the nation, and include poor driving or other related failures to operate a vehicle properly; physical indications (including bloodshot/watery eyes, flushed face, dilated pupils, vomiting, and slurred speech); belligerent or other unusual behavior, and poor performance on the NHTSA standardized Field Sobriety Tests. These Field Sobriety Tests, or FSTs, are widely recognized as strong indicators of impairment. Indeed, I know of no jurisdiction that has declined to accept such tests as reliable, and, therefore, admissible in court. Throughout the country, as well as here in the District,

law enforcement officers are trained and certified through a NHTSA-standardized course, which teaches officers how to properly conduct these tests and how to recognize other signs of impairment. Those who teach the course must first take a NHTSA-certified course for instructors, and officers taking the course must pass a written and practical examination to receive their certification after the course.

It is critical for our citizens to understand that the determination of impairment, when a person's BAC is below .08 or is unavailable, rests largely on these other factors. While it is logical to conclude that the higher the BAC, the more likely the impairment, the converse is sometimes, but not always, true. Indeed, individuals may be impaired due to the interaction between a small amount of alcohol and medications, or as a result of using drugs and no alcohol at all. Thus, in the District, as with everywhere, police officers weigh all of the circumstances at the time of a stop to determine whether a person is impaired and therefore unable to drive safely. This is a probable cause determination that is critical; both to ensure that a driver's civil liberties are intact and to ensure the safety of everyone who could be placed at risk if that driver is too impaired to drive safely.

The process of determining probable cause is in no way unique to the drunken driving arena. Officers have the discretion, and must have the discretion, to make that determination with respect to all criminal laws when they are faced with circumstances where the public safety is at issue. In order to protect the public, officers have to use circumstantial evidence in all kinds of contexts to determine whether to arrest an individual for a particular crime. In the drunken driving context, they consider the factors I described earlier, such as erratic driving or behavior, physical signs, and performance on standardized Field Sobriety Tests. Moreover, unlike the rest of us, including the press, the police have the benefit of being present on the scene to observe, first hand, the individual's physical appearance and behavior, and often, his or her ability to safely operate a car. The police bear ultimate responsibility of determining whether an individual poses a risk if he or she gets back behind the wheel. The consequences of making the wrong judgment can be fatal.

Officers are routinely called upon to make life and death decisions and, while oversight is always important, insight is equally so. There will always be, in every context in criminal law, including drunk driving, close or borderline cases which require substantial discretion, guided by sound judgment. Some of the reactions to the recent articles have suggested that the discretion entrusted to officers in the drunken driving arena must be eliminated. It is not possible or even desirable, to craft the laws in such a way as to eliminate police discretion. The risk to District residents and visitors is simply too great. To eliminate police discretion would eliminate their ability to arrest on the scene at the time when to allow an impaired person to continue to drive is most dangerous.

Because there will always be borderline cases, the system itself contains a number of checks and balances. All arrests must be presented to a prosecutor for a determination of whether to institute charges, or "paper" the case. The prosecutor then makes an independent determination of whether there is in fact probable cause in each specific case. Moreover, the prosecutor must prove the case beyond a reasonable doubt; thus,

prosecutors often apply that higher standard in considering whether to begin a case at all. Even if a prosecutor initially decides to proceed, supervisors, when provided with additional information, can decide to dismiss the case at a later date prior to trial. Ultimately, it is a judge or jury who decides whether the individual should be convicted based on the evidence in the case.

I also want to clarify that the issue here is not whether officers are abusing their ability to arrest without a warrant. Under D.C. Code Section 23-581(a)(1)(B), an officer has the right to arrest without a warrant any time he or she has probable cause to believe that an individual has committed or is committing an offense in his presence. The majority of drunken driving arrests fall in this category, and should do so. The predominant concern of DUI enforcement is to take unsafe drivers off the road immediately, when they pose the greatest danger to themselves and others. Because individuals are not asked to submit to a breathalyzer until after they have been arrested, requiring officers to obtain warrants in such cases would preclude them from obtaining this evidence because by the time a warrant is obtained, the body will have processed a significant amount of the alcohol consumed. In our view, the arrest provision cannot – and should not – be modified because doing so would seriously jeopardize the safety of our roads.

The District Data

The vast majority of the cases that the police – both the Metropolitan Police Department and the federal agencies that operate in the District – bring to the Office of the Attorney General to prosecute, involve individuals with a Blood Alcohol Content (BAC) of .08 or higher. Although OAG does not specifically track cases according to BAC, using both samplings of all cases presented in a randomly selected week, and cases in which diversion was offered in lieu of prosecution, we have found that 9% or fewer of the cases presented to OAG involve a BAC below .08. Moreover, the same review illustrated that the vast majority of the cases where the BAC was below .08 involved a BAC between .05 and .07.

Not surprisingly, it is not at all uncommon for a related offense to accompany a DUI charge. For example, officers may have first pulled the car over for reckless driving, driving at a high rate of speed, or exhibiting other driving patterns that demonstrate their impairment.

Thus, it is fundamentally untrue that large numbers of people are being arrested after having nothing more than a glass of wine and are otherwise un-impaired. Contrary to what has been reported in the media, people who can enjoy a glass of wine without becoming impaired need not worry that they will be arrested and prosecuted. However, let me be absolutely clear: There are, indeed, some people who cannot have a drink or two and drive safely. And that is what this debate is really about: impairment.

Every year, people die in accidents caused by drivers with Blood Alcohol Contents below .08. According to the National Highway Transportation Safety Administration (NTHSA), each year over 1,000 people are killed in traffic accidents caused by a driver

with a BAC below .08. Last year, in the District alone, 6 people died in such accidents. I cannot emphasize strongly enough that that people who are going to drive after drinking know their limit, and stay off the road if they are not safe.

A low BAC does not mean a person is not impaired or under the influence. Indeed, there is some evidence that suggests that many persons who are arrested for DUI with a low BAC, also have drugs in their system. We have had a limited opportunity to pull together all of the relevant information on the co-existence of drugs and alcohol, but I would like to offer the Council the following frightening statistics for the year 2003.

During the year 2003, approximately 20% of DUI arrest cases were referred for toxicological analysis of the defendant's blood or urine. Most of these cases were referred by the police to toxicology because of a low blood alcohol content or other reasons that indicated additional testing was required beyond the breathalyzer. Of those cases analyzed, 94% indicated the presence of drugs and/or alcohol. Shockingly, of the tested cases, 47% tested positive for PCP, 40% tested positive for marijuana, and 14% tested positive for cocaine. Given that PCP, marijuana, or cocaine use will not appear in any BAC measure, but most certainly may cause a driver to be impaired, the Council should be careful not to equate a low BAC with no impairment.

I know that this Committee, along with the Committee on Public Works, is interested in the number of total cases with BAC at different levels. Given the relatively short amount of time that we have had to prepare for this hearing, those numbers are not yet available in any reliable form. However, we will continue to provide the Committee with additional information as we obtain it.

The Proposed Legislation

I would now like to briefly discuss the legislation that is pending before the Committee on Public Works.

As I mentioned during the PowerPoint, the legislation that is before the Committee on Public Works addresses two presumptions that govern the in-court evaluation of certain evidence in a DUI case. First, the bill provides that a BAC of ".05 or less" gives rise to a presumption that the individual was not impaired. We recognize that the creation of such a presumption for low BACs would place the District in line with most other states, but we have not had sufficient time to evaluate the potential impact of such a change and would appreciate additional time to explore this proposal. I would note, though, that the scientific research demonstrates that a significant number of people are impaired at a Blood Alcohol Content of .05 and above. Therefore, if the Council is inclined to change this presumption, we would urge you to amend the language in the bill establish the evidentiary presumption against impairment at a BAC of "less than .05", rather than ".05 or less."

Second, the bill would eliminate the *prima facie* standard in cases involving a BAC at or above .05 and would instead create no presumptions of impairment for BACs of .05 to

below .08. We believe that this presents a greater risk to the citizens of the District. As I testified earlier, the American Medical Association, among others, now believes that significant impairment is seen beginning at BACs as low as .05. Thus, eliminating the benefit of a presumption of impairment in these cases will curtail the prosecution of cases involving drivers who are at or close to levels which are growing increasingly accepted as substantially impaired. The permanent repeal of the *prima facie* standard in these cases will undoubtedly mean that some substantially impaired individuals will not be prosecuted.

Importantly, the District is by no means alone in having a *prima facie* provision, which essentially creates a rebuttable presumption at levels lower than .08; Colorado has a very similar provision in its laws, and both New York and Maryland have similar provisions at the .07 level. Moreover, it is clear that people make incredibly dangerous decisions, decisions that can be fatal to our citizens, at those levels. Just last week, the U.S. Attorney's Office for the District of Columbia convicted a man of Involuntary Manslaughter after he sped through a red light and killed a financial planner last November. That defendant had a Blood Alcohol Content of .065. This is an area where strong enforcement can and does prevent fatalities. Removing this provision has significant potential to impact the Metropolitan Police Department's ability to remove such unsafe drivers from the road. Moreover, a Blood Alcohol content of .07 does not occur in people who have had only one glass of wine – even a 90 pound woman will generally have a BAC of just over .05 with one drink.

For all of these reasons, we urge the Council to leave in place the *prime facie* standard that, until last week, existed for BACs between .05 and less than .08.

Finally, throughout the debate on the dais last week, I heard Councilmembers emphasize the need to bring District law into sync with other jurisdictions. To that end, there are a number of other ways in which the District falls behind.

First, the existing methods of measurement for Blood Alcohol Content under District law are scientifically outdated. Accordingly, we would recommend that the permanent legislation adopt the standard of grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath, as adopted in both Maryland and Virginia. OAG would be happy to work with the Council, the Metropolitan Police Department, and the Office of the Chief Medical Examiner, to identify and carefully draft appropriate changes such as these.

Second, in comparison to some jurisdictions, the District's penalties for even the most egregious offenders are low. My Office would therefore be happy to work with the Council to ensure that District law provides for sanctions that reflect the seriousness of driving while intoxicated.

Third, there are a significant number of people who when stopped after drinking and driving refuse to submit to a chemical test at all. In the District, unless the person has been involved in an accident, the person has a right to refuse. Although there are

licensing consequences to that refusal, in the District, unlike in 10 states[1] including Virginia and Maryland,[2] such a refusal is never a crime in and of itself.

Thank you for the opportunity to help clarify the state of drunken driving laws in the District. I hope that I have helped to resolve some of the misconceptions that have resulted from the recent media frenzy and look forward to working with the Council to strengthen the District's drunken driving laws in a reasonable and responsible fashion. I am happy to answer any questions you may have at this time.

[1] Alaska, California, Indiana, Maryland, Minnesota, Nebraska, New Jersey, Ohio, Rhode Island, Virginia.
[2] In Maryland, the refusal is only subject to criminal penalties if the individual is convicted of drunk driving.